Supreme Court, U. S.
FILED
MAY 3 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1525

RAMON RAMIREZ,

Petitioner,

versus

UNITED STATES DEPARTMENT OF INTERIOR-BUREAU OF RECLAMATIONS, et. al.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No.

RAMON RAMIREZ,
Petitioner,

versus

UNITED STATES DEPARTMENT OF
INTERIOR-BUREAU OF RECLAMATIONS, et. al.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RAMON RAMIREZ, Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in the above case.

OPINIONS BELOW

The opinion of the District Court for the Western District of Texas is unreported and a copy is attached. The opinion of the Court of Appeals for the Fifth Circuit is reported at 546 F. 2d 645 (5th Cir. Tex. 1977), a copy of which is attached.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 4, 1977. On March 2, 1977, the Court of Appeals entered an order denying rehearing en banc and copies thereof are appended to this Petition. The jurisdiction of this court is invoked under 28 US Code Section 1254 (1).

QUESTIONS PRESENTED

Question Number One

Whether the United States District Court for the Western District of Texas was correct in its conclusion that the operation of the Franklin Canal is a government function involving discretion and is therefore exempt from the provisions of the Federal Tort Claims Act by Section 2680(a), Title 28 United States Code.

Question Number Two

Whether *Avina v. United States*, 115 F. Supp. 579 relied on by the District Court and the Court of Appeals and the resulting decisions by the above courts is in harmony with other circuits and with the decisions of the Supreme Court of the United States in its application of Section 2680(a), Title 28 United States Code.

Question Number Three

Whether the courts below fully examined the issue of negligence on the part of the Department of the

Interior-Bureau of Reclamation in light of Texas decision dealing with owners and occupiers of land.

Question Number Four

Whether the courts below fully examined the issue of government negligence in view of duty imposed by existing government regulations and standards.

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

The text of 28 US Code, Section 2680(a) is as follows:

> The provisions of this chapter in Section 1346(b) of this Title should not apply to:
>
> (a) any claim based upon an act or omission of an employee of the government exercising due care in the execution of a statute or regulation whether or not such a statute and regulation be valid, based upon the exercise or performance or failure to exercise and perform a discretionary function or duty on the part of a federal agency or employee of a government whether or not the discretion involved be abused.

STATEMENT

This suit under the Federal Tort Claims Act arose from the death by drowning of Samuel Ramirez, a minor child six years of age, in the Franklin Canal, an

irrigation project operated by the Department of the Interior-Bureau of Reclamation. Suit was filed in District Court for the Western District of Texas. The suit was tried before the court which entered a judgment that the Plaintiff take nothing by their suit. The Court held that the Franklin Canal being authorized, created and maintained on authority of acts of Congress of the United States was a government function involving discretion and therefore exempt from the provisions of the Tort Claims Act by Section 2680(a), Title 28 United States Code. Notwithstanding this conclusion, the Court went on to find no actionable negligence on the part of Defendant, and contributory negligence on the part of the deceased child, Samuel Ramirez and the parents of said child. Samuel Ramirez was drowned when he accidentally fell in the canal while playing along its banks. The canal is contiguous to a portion of the Ruben Salazar Complex, a local government housing project. To gain access to the canal, Samuel Ramirez had climbed a six foot fence owned and maintained by the El Paso Housing Authority. No other barrier separated the canal from the Housing Project.

The judgment was entered on the 5th day of May, 1976. Timely notice of appeal was served on the 21st day of May, 1976. On appeal, the Court of Appeals affirmed the decision below on the summary calendar.

REASONS FOR GRANTING THE WRIT

The petition below should be reviewed because it erroneously applies the Discretionary Function Exclusion, 28 US Code 2680(a) and thereby wrongfully bars a deserving Plaintiff from recovery under the

Federal Torts Claims Act. In addition, the decisions cause discordance and confusion in carrying out of the goals sought by Congress in enacting the Federal Torts Claims Act. The misapplication and misunderstanding of the Discretionary Function Exclusion by the Trial Court prevented the issue of governmental negligence from being fully examined. In particular, both courts below ignored the standard of care imposed on an owner or occupier of land with regard to trespassing minors in Texas. The specific errors are as follows:

I.

The District Court held that the Franklin Canal being authorized, created, and maintained under the authority of acts of Congress of the United States, is a government function involving discretion and is exempt from the provisions of the Tort Claims Act by Section 2680(a), Title 28 US Code. The Court of Appeals expressed doubt as to the existence of governmental immunity, yet in effect endorsed the District Court's decision by citing with approval the case of *Avina v. United States*, 115 F. Supp. 579 (W.D. Tex. 1953) which also holds that the Franklin Canal is a government function involving discretion and is thereby exempt from the provisions of the Federal Torts Claims Act by Section 2680(a), Title 28 US Code.

The courts below and *Avina* are not in accord with the development of the law in this area. With regard to suit under the Federal Torts Claims Act, it is well settled that when a public works project is negligently operated or maintained the discretion which the

government used in having the project built has been exhausted and is no longer a bar to an action under the Federal Torts Claims Act. *Bevilaqua v. United States*, 122 F. Supp. 439 (W.D. Penn. 1954); *Dye v. United States*, 210 F. 2d 123 (6th Cir. Ken. 1954); *Maryland to the use of Pumphrey v. Manor Real Estate and Trust Company*, 176 F. 2d 414 (4th Cir. Md. 1949); *Hopson v. United States*, 136 F. Supp. 804 (W.D. Ark. 1956); *U.S. v. Washington*, 351 F. 2d 913 (9th Cir. Wash. 1965). This distinction has been referred to as the "planning level" vs. "operational level" dichotomy and has been used in numerous courts as the definitive criteria for application of the Discretionary Function Exclusion. *U.S. v. Hunsucker*, 314 F. 2d 98 (9th Cir. Cal. 1962), *Fair v. U.S.*, 234 F. 2d 288 (5th Cir. Tex. 1956); *Sullivan v. United States*, 299 F. Supp. 621, 626 (N.D. Ala. 1968) affmd. on opinions below, 411 F. 2d 794 (5th Cir. 1969). In operation of this criteria the Court simply looks to the echelon in which the tort occurred. If it is found that the tort occurred at the planning level, the exception clearly applies and the suit is precluded. However, if negligence results from the actions and decisions of government agents at the operational level, the discretion of the government is deemed to have been exhausted and the exception is no longer a bar.

At trial in the present action the Plaintiff had alleged government negligence at the operational and maintenance level. Specifically, negligence in erecting and maintaining a proper barrier between the canal and the housing project and in failing to install and maintain safety devices in the canal as called for in government safety manuals. In dealing with precisely these instances of negligence, the Courts have uniformly held the Discretionary Function Ex-

ception does not operate to preclude suit under the Federal Torts Claims Act. *Foster v. United States*, 183 F. Supp. 525, 528 (D. N.M. 1956) affmd. 280 F. 2d 431 (10th Cir. 1960) dealing with effective barriers in the canal. *Anderson v. United States*, 138 F. Supp. 332 (N.D. Cal. 1956) and finally *United States v. De Camp*, 478 F. 2d 1188 (9th Cir. Cal. 1973) cert. den. 414 US 924 (1973) dealing with the failure to install safety devices.

In addition, the recent case of *Clemente v. United States of America*, 422 F. Supp. 564 (DPR 1970) is authority that the discretionary function exclusion is not a defense to a government agent's failure to implement adequate safety regulations. The Plaintiff, Ramon Ramirez, introduced competent evidence that there were available government publications which called for safety devices to be used in connection with irrigation canals. The installing of such devices was not discretionary with the Bureau of Reclamation in view of the eminent danger involved.

The foregoing authorities carry out the intent of Congress in enacting the Federal Torts Claims Act and its exclusion. The intent of Congress was for the federal government and its agents to be "liable for torts in the same manner and to the same extent as a private individual under like circumstances." (28 US Code Section 2674). Congress, however, did not intend that the act be used to frustrate legislative and executive function of government. For this reason the discretionary function exclusion was adopted. It should be clear from the pleadings in this action that the acts of negligence alleged occurred at the operational level. Therefore, the District Court clearly erred when

it concluded that the present action is exempt from the provisions of the Federal Torts Claims Act by the discretionary function exclusion. The Court of Appeals also erred when it did not reverse the District Court and in its endorsement of *Avina v. United States.*

II.

In dealing with the issue of governmental negligence, the District Court concluded that the Bureau of Reclamation breached no duty to the minor, Samuel Ramirez. An examination of the record indicates that the Court, after determining the "discretionary function exclusion" applied, ignored the issue of negligence as presented by the Plaintiff. The evidence presented and the decisions rendered indicate that the Court dealt rather summarily with the issue of negligence and that their decision and their conclusion were clearly erroneous.

It is clear that under the laws and decisions of the state of Texas, any landowner acting as did the United States government in this case would have been held liable for the death of Samuel Ramirez. It is also clear that the courts below erred in their application of Texas law dealing with contributory negligence of a child and the parents of said child.

In connection with an attractive hazard, it is the law in Texas that a landowner or user of land will be liable for injuries or death to a child of tender years who is trespasser on the land if such child is enticed or attracted upon the land by an attractive hazard which ultimately causes his injuries, if the owner should have

reasonably anticipated under the circumstances that children of tender years and immature judgment would be attracted thereto. *Natatorium Laundry Co. v. Saylors,* 131 SW 2d 799 error dismd., judgment correct. *Banker v. McLaughlin,* 146 Tex. 434, 208 SW 2d 843.

In *Banker* (supra.) the Texas Supreme Court endorsed the criteria for an attractive hazard. An attractive hazard exists when:

> (a) The place where the condition is kept is one which the possessor knew or had reason to know children would be likely to frequent;
>
> (b) The condition is one which possessor knew or has reason to know involves unreasonable risk to children;
>
> (c) The child because of his tender years does not realize the danger involved;
>
> (d) The utility of eliminating the danger is slight compared to the probability of injury therefrom. *Banker,* p. 847.

It is also clear that the status of the child upon the land in such instances is no longer material and the landowner owes a duty to use ordinary care to safeguard such child whenever its presence is foreseeable. *Courtwright v. Southern Compress and Warehouse Co.,* (CA) 299 SW 2d 169. With regard to the issue of contributory negligence, the Court in *Banker* (supra.) held that a child 5 years 10 months old was incapable of appreciating the danger involved in an ex-

cavation which had filled with water. The Court established a duty on the owner to protect said child against danger of drowning and rejected Defendant's argument that such child was a trespasser. In *Massey v. Copeland*, 233 SW 2d 449 (Tex. 1950) the Supreme Court again endorsed the four-point test. They however denied recovery to a fourteen-year-old who drowned in almost identical circumstances as the *Banker* case. The Court felt that a fourteen-year-old boy could appreciate the danger inherent in swimming in the excavation and as to such child the condition did not constitute an attractive nuisance or hazard. However, a condition may be such that even a fourteen-year-old child can come under the umbrella of the attractive nuisance rationale. In *Dezendorf Marble Co. v. Gartman*, 333 SW 2d 404 (Tex. Civ. App. 1960) affmd. 161 Tex. 535, 343 SW 2d 441, the court held that a dynamite blasting cap was of such a deceptive nature that a fourteen-year-old child was not guilty of contributory negligence when he handled it and was injured in the resulting explosion. The Court found that the deceptive nature and seeming safety of the blasting cap did not provide enough warning as to alert a fourteen-year-old. The two cases illustrate that when an attractive nuisance is established a child of tender years who was injured by the instrumentality or condition cannot as a matter of law be held guilty of contributory negligence. Since he is attracted upon the land by the attractive hazard, he is no longer a trespasser or an invitee but is deemed to have received an implied invitation to enter and is rightfully upon the land. (*Banker*, p. 848).

The District Court did not resolve the issue of governmental negligence in light of the foregoing

Texas authorities. Rather, the issue of negligence was summarily disposed of based on the mistaken belief that the discretionary function exclusion precluded suit in this case. The error below was two-fold. The District Court did not fully examine the issue of negligence because they felt that the case was disposed of by the application of the discretionary function exclusion, and the Court of Appeals while apparently recognizing this error on the part of the District Court did not reverse on the mistaken belief that the issue of negligence had been fully examined. As a direct result of the foregoing errors the family of Samuel Ramirez was unjustly deprived of recovery for their loss.

III.

The District Court also totally ignored the implication of the existence of government standards dealing with safety devices to be used in connection with irrigation canals. In other instances where government standards have been established by federal regulation, i.e. (the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C.A. Sections 1381 et. seq.; The Consumer Product Safety Act (1972), 15 U.S.C.A. Section 2051 et. seq.; The Occupational Safety and Health Act (1970), 29 U.S.C.A. Section 651 et. seq.; The Federal Hazard Substance Act (1960), 15 U.S.C.A. Section 1261 et. seq., etc., etc.) violation of a specific standard subjects a defendant to liability on negligence per se theory or on the basis that unexcused violation of the statutes, standard or regulation constitutes some evidence of negligence. *Orthopedic Equipment Company v. Eastler*, 276 F. 2d 455 (4th Cir. 1960), misprinting of surgical data in violation of Federal Food, Drug,

and Cosmetic Act; *Chapman v. Brown*, 198 F. Supp. 78 (D. Hawaii 1961) dealing with violations of Flammable Fabrics Act; *Gober v. Revlon Inc.*, 317 F. 2d 477 (4th Cir. 1963) dealing with the liability of a cosmetics manufacturer to allergic user for violation of FDCA.

By logical extension, the existence of federal safety information published by the appropriate federal agency in a report form is evidence that an implied duty exists on the part of the defendant to implement the safety standards and a failure to do so is basis for liability. This is especially true when the circumstances are such that a clear and ongoing danger exists which can be greatly reduced by the use of the safety methods indicated in the government report. Such was the case in the present action. In view of the proximity of the Franklin Canal to the Salazar Housing Project with its large concentration of children a duty exists on the part of the government to use every safety method available to safeguard the children. This included the safety features contained and described in the government reports as presented by the Plaintiff to the Trial Court. Instead, the government did not even build its own fence between the Salazar Housing Project and the Franklin Canal but rather chose to rely on a fence erected by a local government entity. It is clear that the government's implied duty to safeguard the public was not discharged in this case. The evidence presented at trial clearly indicates that the fence built by the El Paso Housing Authority was never intended to be a barrier but simply a boundary marker. The government, nevertheless, chose to rely on this inadequate fence in discharge of their duty.

The issue of government negligence was not examined in view of the foregoing authorities and standards. Failure to so examine the issue was probably due to the finding by the Court that the discretionary function exclusion precluded the suit in any case, and consequently the issue of negligence could be summarily disposed of.

IV.

The questions presented in this case are of great and recurring significance to future cases under the Federal Torts Claims Act. If allowed to stand, the decisions below would convey the impression that the government is immune from prosecution for its torts in connection with the operation and maintenance of a public works project and children will continue to drown. As a consequence, the Bureau of Reclamation will have no incentive to upgrade their safety methods and children will continue to drown even though their safety could be insured by appropriate government action. The great weight of authority suggests that it was not the intent of Congress in passing the Federal Torts Claims Act and its discretionary function exclusion to provide the Government with this type of immunity. The Department of the Interior-Bureau of Reclamation should be liable for its torts in the operation and maintenance of the Franklin Canal in the same manner and into the same extent as any other landowner in Texas. The record shows that such standards were not used below. For this reason, the Court should exercise its discretionary jurisdiction and review this action.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

L. TAYLOR ZIMMERMAN
Counsel for Petitioner
808 Bassett Tower
El Paso, Texas 79901

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I have this ____ day of May, 1977, served three copies of the foregoing Petition for Writ of Certiorari on Mr. John A. Grambling, by placing same in the U.S. Mail, postage prepaid.

APPENDIX

JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

Filed: May 6, 1976

RAMON RAMIREZ,

Plaintiff,

v. NO. EP-75-CA-9

THE UNITED STATES DEPARTMENT OF INTERIOR — BUREAU OF RECLAMATION, EL PASO COUNTY WATER IMPROVEMENT DISTRICT NUMBER ONE, THE CITY OF EL PASO and THE HOUSING AUTHORITY OF THE CITY OF EL PASO,

Defendants.

On the 29th day of April, 1976, came on to be heard and considered the above entitled and numbered cause. The Plaintiffs, Ramon Ramirez and Martha Ramirez, appearing in person, and by their duly authorized attorney of record, and the Defendant, United States Department of Interior - Bureau of Reclamation, appearing by its attorney of record, and all matters in controversy, both as to fact and as to law, were submitted to the Court without the intervention of a jury for its consideration. At the close of the Plaintiffs' evidence, the Defendant moved for Judgment, and the Court having considered the Motion, pleadings, evidence and argument of counsel, being of the opinion that the Plaintiffs should take nothing by their suit against the Defendant.

IT IS, THEREFORE, THE ORDER, JUDGMENT AND DECREE of the Court that Plaintiffs, Ramon Ramirez and Martha Ramirez, take nothing by their suit, and that the Defendant, United States Departmei t of Interior - Bureau of Reclamation go hence without day.

The Court further ORDERS that all Court costs in this suit are taxed against Plaintiffs.

SIGNED AND ENTERED this 5th day of May, 1976.

/s/ WILLIAM S. SESSIONS,
William S. Sessions,
U. S. District Judge

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

In the United States District Court
For the Western District of Texas
El Paso Division

RAMON RAMIREZ,
Plaintiff,

v. NO. EP-75-CA-9

THE UNITED STATES DEPARTMENT OF INTERIOR - BUREAU OF RECLAMATION, EL PASO COUNTY WATER IMPROVEMENT DISTRICT NUMBER ONE, THE CITY OF EL PASO and THE HOUSING AUTHORITY OF THE CITY OF EL PASO,
Defendants.

The above entitled and numbered cause, having been tried before the Court without a jury on April 29, 1976, and the Court, having duly considered the evidence presented by the Plaintiffs and the Motion of the Defendant for judgment, makes and files the following Findings of Fact and Conclusions of Law as required by Rule 52(a) of the Federal Rules of Civil Procedure:

FINDINGS OF FACT

1. On March 10, 1974, Samuel Ramirez, a boy six years and seven months of age, son of the Plaintiffs herein, drowned in the Franklin Canal in El Paso, Texas.

2. At the time of his death, Samuel Ramirez was residing with his parents at 1840 Cypress, Apt. 1175, in the Ruben Salazar Housing Complex, in El Paso, Texas.

3. The Franklin Canal runs through the south part of El Paso, is owned and operated by the United States Government under the control and supervision of the United States Department of Interior, Bureau of Reclamation, and is contiguous to portions of the Ruben Salazar Housing Complex.

4. The Franklin Canal is an essential part of the Government's plans and efforts through the Bureau of Reclamation to conserve and furnish water for irrigation purposes to the public.

5. In 1939 the Government expended in excess of $50,000.00 to construct a heavy mesh wire fence, six

feet in height, enclosing a great portion of the canal as it runs through the City of El Paso, Texas. A six-foot high chain link mesh fence between the Ruben Salazar Housing Project and the Franklin Canal, abutting the site of the drowning, was constructed by the Housing Authority of the City of El Paso in 1973 or the early months of 1974.

6. At the time of the construction of this latter fence, in 1973, consideration was given to the possible placement of three strands of barbed wire at the top of the fence. However, general public outcry in opposition persuaded officials of the Housing Authority not to implement this measure.

7. On the occasion in question, Samuel Ramirez, accompanied by his brother, John Ramirez, then age eight, and Pete Ramirez, then age four, climbed the 1973 fence which had been designed, erected, owned and maintained by the Housing Authority of the City of El Paso.

8. The United States Department of Interior, Bureau of Reclamation, has at all pertinent times exercised more than ordinary care to prevent children from swimming in the Franklin Canal or playing in it.

9. The United States Department of Interior, Bureau of Reclamation, was not negligent in failing to construct escape ladders, closed circuits, siphon protection, underground conduits, or by failing to cover the canal with concrete lining or wire mesh.

10. The Plaintiffs, parents of Samuel Ramirez, were themselves negligent in failing to properly

supervise Samuel Ramirez to prevent his playing near the canal. Plaintiffs, though aware that Samuel was, in fact, repeatedly playing near the canal, took no steps to insure that Samuel Ramirez complied with their repeated warnings not to play near the canal.

11. Samuel Ramirez was a bright, intelligent, first-grader who was capable of understanding the warnings given to him by his parents and was further able to comprehend the danger inherent in playing near the canal.

12. Samuel Ramirez, within a few moments of his falling in the canal, had been warned by his mother, his brother John Ramirez, and a neighbor, "Vickie", to stay away from the canal but he nevertheless persisted in ignoring all such warnings.

13. The United States Department of Interior, Bureau of Reclamation, was not negligent in failing to construct an additional fence between the canal and the fence constructed by the Housing Authority of the City of El Paso.

CONCLUSIONS OF LAW

1. The Franklin Canal, being authorized, created and maintained under authority of acts of Congress of the United States, is a governmental function involving discretion, and is exempt from the provisions of the Tort Claims Act by §2680(a), Title 28, United States Code. *Dalehite v. U. S.*, 346 U.S. 15, at p. 33, 73 S.Ct. 956. See also *Avina v. U. S.*, 115 F.Supp. 579 (W.D. Tex. 1953).

2. The minor, Samuel Ramirez, at the place of the accident, was a mere licensee and the Defendant United States breached no duty toward said minor. The Plaintiffs have failed to prove any negligence whatsoever on the part of the Defendant.

3. The Plaintiffs' negligence in failing to properly supervise their child, Samuel Ramirez, was a proximate cause of the accident and any damages sustained by them.

4. The minor, Samuel Ramirez, though but six years and seven months of age, was capable of understanding the warnings of danger and the danger inherent in playing near the Franklin Canal and was therefore capable of contributory negligence.

5. The negligence of Samuel Ramirez, in ignoring the warnings of danger and in climbing over the fence and falling into the canal, was a proximate cause of the accident and the damages complained of by the Plaintiffs.

ACCORDINGLY, Defendant's Motion for Judgment at the close of Plaintiffs' evidence is granted, and

IT IS ORDERED that judgment be entered for Defendant with costs taxed against the Plaintiffs.

May 6, 1976

/s/ WILLIAM S. SESSIONS
WILLIAM S. SESSIONS
United States District Judge

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Ramon RAMIREZ, Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF INTERIOR-BUREAU OF RECLAMATION et al., Defendants-Appellees.

No. 76-2875
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Feb. 4, 1977.

Appeal from the United States District Court for the Western District of Texas.

Before AINSWORTH, CLARK and RONEY, Circuit Judges.

PER CURIAM:

This is an appeal from a judgment entered for defendant at the close of plaintiff's evidence in a nonjury trial. The wrongful death action was brought by the parents of a six-year-old child who drowned in the Franklin Canal, owned and maintained by the United States Government.

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* Rule 18, 5th Cir., see *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al.*, 5th Cir. 1970, 431 F.2d 409, Part I.

Based on the allegations in this case, we have serious doubt as to whether the Government is immune from the allegations of negligence in this suit under the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C.A. § 2680(a), *see Dalehite v. United States*, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953), as held by the district court. We do not, however, have to resolve this issue. The additional findings and conclusions of the court that there was no actionable negligence on the part of defendants are not clearly erroneous and properly apply Texas law, which controls this case. *Cf. Avina v. United States*, 115 F.Supp. 579 (W.D.Tex. 1953).

AFFIRMED.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-2875
Summary Calendar

D. C. Docket No. CA EP 75-9

RAMON RAMIREZ,
Plaintiff-Appellant,

versus

UNITED STATES DEPARTMENT OF INTERIOR-
BUREAU OF RECLAMATION, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

Before AINSWORTH, CLARK and RONEY, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

FEBRUARY 4, 1977

ISSUED AS MANDATE: MAR. 10, 1977

United States Court of Appeals
Fifth Circuit
Office of the Clerk
March 2, 1977

TO ALL PARTIES LISTED BELOW:

No. 76-2875 - Ramon Ramirez v. U.S. Department of Interior-Bureau of Reclamation, ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

/s/ SUSAN M. GRAVOIS
Deputy Clerk

cc: Mr. L. Taylor Zimmerman
Mr. John A. Grambling

Supreme Court, U. S.
FILED
JUN 27 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1525

RAMON RAMIREZ,

Petitioner,

versus

UNITED STATES DEPARTMENT OF
INTERIOR-BUREAU OF RECLAMATIONS, et. al.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 76-1525

RAMON RAMIREZ,
Petitioner,

versus

UNITED STATES DEPARTMENT OF INTERIOR-BUREAU OF RECLAMATIONS, et. al.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Comes now the United States Department of Interior-Bureau of Reclamation, Respondent and files this its Brief in Opposition to the Petitioner's Petition for a Writ of Certiorari to review the Judgment rendered by the Court of Appeals for the Fifth Circuit in the above styled case.

STATEMENT OF THE CASE

The Statement of The Case in the Petition filed by Petitioners herein is substantially correct insofar as it goes, but contains no statement of facts and merely recites allegations from their Amended Complaint. Therefore, Respondent will herein set out enough of the evidence to show that the findings of fact, conclusions of law and judgment of the Court below were fully justified, if not actually compelled.

STATEMENT OF FACTS

Johnny Ramirez testified in part to the following effect: He was 10 (ten) years old at the time of trial, and was 8 years old when the accident occurred, and at that time the decedent Sam was 6; on that afternoon Johnny, Sam and 4 year old brother Pete climbed over the fence at the rear of the Salazar Housing Project where they lived with their parents, and went to the Franklin Canal and began throwing rocks in the water; Sam tried to pry loose a "stick" growing in the bank of the canal, and the "stick" broke and Sam fell into the water; then Sam went under a bridge, and Johnny saw Sam's hair and hands three times in the water and saw him no more, and went home to tell his mother, climbing the fence again to get there; (Appx. 121-131); on the way to the canal, Johnny [et al] not only had to climb the fence (D Ex. A Appx. 451) but also had to cross the railroad tracks (D Ex. B Appx. 451) to get to the area shown on D Ex. C (Appx. 452) where Johnny, Sam and Pete were playing on the canal bank; their mother and father had warned Johnny and Sam not to go near the canal, and even Pete who was 4 years old knew they were not supposed to go near the canal; just before the accident the three boys were playing policemen, and Johnny and Pete were the police, and Sam was the "guy" they were trying to catch, and Sam went over the fence to escape from the "police", and Johnny and Pete went over the fence to catch him, and then they sat down, and Johnny saw Sam go down near the canal, and Johnny again told Sam to "get away from the canal", and Sam replied that he would not fall down into the water, and then Sam tried to get the "stick" out of the ground, and the "stick" broke, and Sam fell in the canal; Sam was not trying to swim in the canal

or trying to play in the canal, and what he was after was the "stick". Johnny remembered that afternoon before they went to eat lunch, the three boys were told by a girl about 13 or 14 years old whom they knew and who lived in that area to get away from the canal, but after going home to eat their lunch the boys returned and climbed over the fence, and it was then that Sam fell into the canal and went under the water; none of the boys could swim. (Appx. 133-139). Under questioning by the Court, Johnny reiterated his testimony about the girl telling them to get away from the canal, and identified her as "Vickie", who since the accident has moved to another apartment. (Appx. 154).

James W. Kirby, Project Superintendent, Rio Grande Projects, U. S. Bureau of Reclamation, testified in part to the following effect: the fence between the Housing Project and the canal was sufficient to keep small children out; (Appx. 163); further that the fence the Ramirez boys climbed was 6 feet high and built by the City Housing Authority, and was not topped by barbed wire; the canal in question was not concrete-lined; (Appx. 186-187); the culvert or bridge belongs to the railroad and not to the Government; the Franklin Canal was originally privately owned and was built around 1880 and was acquired by the Bureau of Reclamation in 1914 and thereupon reconstructed; (Appx. 193-195); the fence over which the boys climbed equalled or exceeded the design manual requirements of the Reclamation Bureau, and based thereon, as well as Mr. Kirby's own convictions, the fence was adequate to keep out small children; (Appx. 212); the canal is operated by the U. S. Government and serves about 16,000 acres of irrigated land for the public; in 1939 the Government spent about $50,000 to fence in the canal throughout

the then section of the City of El Paso that the canal traversed, to deny access to the canal by the public; the Housing Authority of the City of El Paso owns, designed and caused to be erected the fence over which the Ramirez boys climbed, and the Housing Authority purports to maintain such fence; as the City of El Paso is now constituted, the Franklin Canal traverses 13.8 miles within the City; before the Salazar Project was constructed by the City's Housing Authority, the area was occupied by a Steel Mill and other industrial plants. Ever since 1970-1971, the Reclamation Bureau has promoted safety programs in the irrigated portions of the El Paso Valley, and more especially in every school in proximity to the canal, which would include Douglass School; (Appx. 214-225).

Enrique Bustamante testified in part to the following effect: he is Executive Director of the Housing Authority of the City of El Paso; in March of 1974 he was its Director of Development; the Salazar Housing Project was built in 1973, and previously the area was zoned "industrial", and was occupied principally by the Darbyshire Steel plant, and the zoning was changed by the City Plan Commission to permit building the Housing Project; directly behind the Salazar Housing Project were the railroad tracks, and then the canal; before the project was built, there had been a fence along Darbyshire's property line, which was taken down and replaced by a fence without barbed wire topping, because certain militant groups had complained that the Housing Authority was constructing "concentration camps" and fencing in the tenants, and the Housing Authority did not want to get involved in any "civil rights" controversies; the new fence was 6 feet high and was a chain link fence, and was designed, built on the prop-

erty line of the Project, paid for and maintained by the Housing Authority, through its architects, contractors and employees; witness had been employed by the City's Housing Authority since 1970. (Appx. 225-238).

Martha Ramirez, mother of the decedent and one of the Plaintiffs, testified in part to the following effect: their family moved into the City's Housing Project about 5 months before Sam was drowned on March 10, 1974, which was a Sunday; before lunch Mrs. Ramirez stayed on her front porch to watch over the play of some of her 8 children, and just before she started to prepare lunch she saw Sam approaching from the direction of the canal, and told him: "Darn it, you been going again at the canal"; the kids ate lunch, and she was attending their baby when Johnny came in crying, and then told her that Sam had gone to the canal; she went there but did not see Sam, and his body was found in the canal the next morning not so far from her apartment; sometimes Sam would help her around the house, but never would do exactly what she told him to do; (Appx. 247-254); on cross-examination she at first said that Sam was born on July 3, 1965, and then that he was 6 years old when he drowned in March of 1974, and then admitted that she had told the police on the police report of the accident that Sam was born on July 3, 1965, and then testified that she really did not remember when he was born; (Appx. 255); when Sam left after lunch, she gave him no further supervision or thought, but did tell him not to go to the canal, and that this occurred about 3 or 3:30 that afternoon; Sam was in the first grade at Douglass School, and was intelligent and had the understanding of a normal 6 year old boy; he was really more of a bother than a help around the home, and Mrs. Ramirez looked to her husband, and not to

Sam for her support, and never expected Sam to ever give her any support, but expected him to get married and leave home when he grew up; (Appx. 255-267); Mrs. Ramirez said that she had seen her boys playing near the canal from time to time, and for that reason had started telling them not to go over to the canal; (Appx. 269).

Plaintiff Ramon Ramirez testified in part to the following effect: that he had prohibited Sam and Johnny from going to the canal, and had reminded them "continuously at all times"; after the boys jumped over the fence, they had to cross the railroad tracks also to reach the canal; that he was not expecting Sam or any of the other children to support him, and that in this age it would be like a person who sows wheat or corn, but does not know what he would harvest; (Appx. 292-295).

REPLY TO QUESTION PRESENTED BY PETITIONERS

I.

The Trial Court's holding that the operation of the Franklin Canal was a discretionary function so as to immune the Government from its negligence was not decisive to the Judgment rendered.

Petitioners Questions Number One and Two challenge the District's Court's holding as to the operation of the Franklin Canal as a discretionary function so as to immune the Government from negligence under an exception to the Federal Tort Claims Action, 28 U.S.C.A. 2680(a). However, this holding regarding the operation of the Franklin Canal was, in fact, immaterial and not decisive to the Court's Judgment. The Petitioners fully developed their case and the District Court properly found that under the evidence Respondent was not negligent, but that the decedent and Petitioners were each contributorily negligent and such negligence was a proximate cause of the accident and damages claimed by Petitioners. This being the case Petitioners were not entitled to judgment in any event for they failed to make out a case against Respondent, and secondly their own contributory negligence was a proximate cause of the accident and damages they sought to recover for.

II.

Findings on negligence and contributory negligence barred Petitioners from a recovery.

The Trial Court found no negligence on the part of the Respondent, but did find contributory negligence

on the part of both the decedent and his parents, the Petitioners herein. Whether a particular act or omission constitutes negligence is usually a question of fact, *Blanks vs. Southland Hotel*, 149 Tex. 139, 229 SW2d 357. Any one of these findings would have supported a Judgment for Respondent.

Petitioners Questions Number Three and Four seek review of the complete record relating to whether Respondent was negligent which the Court of Appeals for the Fifth Circuit has already reviewed, and held that the Trial Court's findings were not clearly erroneous and that the Texas laws had been properly applied.

Rule 52(a), F.R.C.P. in pertinent part provides that in actions tried on the facts without a jury, the Court's findings of fact shall not be set aside unless clearly erroneous; and it is held consistently that such rule applies to Federal Tort Claims Actions; *Adams v. U.S.*, C.A. 5-1969, 411 F.2d 603; *Stone v. U.S.*, C.A. 5-1969, 408 F.2d 995; *Williams v. U.S.*, C.A. 5-1968, 405 F.2d 234; *U.S. v. Varner*, C.A. 5-1968, 400 F.2d 369.

As to the decedent child, Respondent, The Reclamation Bureau did not have the burden of making its canal "childproof"; *McClary v. Jones*, (Tex.S.Ct.-1966) 404 SW2d 213, quoting "Prosser On Torts", 1964, p. 378, Ch. 11, §59.

The general rule is that the victim of an injury occurring on the premises of another may not recover damages if he is a trespasser or licensee; *Wimberly v. Gulf Production Co.*, (Civ. App.) 274 SW 986; *Burton-Lingo Co. v. Morton*, (Civ. App.) 126 SW2d 727, affirmed 136 Tex. 263, 150 SW2d 239; *Gotcher v. Farmersville*, (Civ. App.) 139 SW2d 361, affirmed 137 Tex. 12, 151 SW2d 565; *Mack v. Houston, E.&W.T.R. Co.*, (Civ. App.) 134

SW 846; and a host of other cases cited in the footnotes to 40 Tex. Jur. 2d Rev. Part 2, §47, page 205 et seq., NEGLIGENCE.

Further, in the case of *Sorrentino vs. McNeill*, (Civ. App.) 122 SW2d 723, writ of error refused, the Texas Court of Appeals in affirming a Judgment for the Defendant held that a question of fact was raised for the trier as to the contributory negligence of a six year old child who ran into the street and was struck by a car.

Petitioner does not discuss the further finding of the Trial Court that Petitioners themselves were negligent in failing to properly supervise their child and this was a proximate cause of the accident and damages sustained by Petitioners. At the time of the accident in question, under Texas law, contributory negligence on the part of a Plaintiff was a complete bar to a recovery by a Plaintiff irrespective of the negligence of a Defendant. *Southern Pacific Company v. Ruth Matthews*, (C.A. 5 Tex) 355 F2d 924 certiorari denied, 85 S.Ct. 668.

Conclusion of law for "take nothing" judgment:

In view of the Trial Court's findings of no primary negligence on the part of the Respondent, Bureau of Reclamation, and the findings of contributory negligence on the part of both Sam Ramirez and his parents, the Petitioners, no judgment could legally have been entered other than the "take nothing" judgment entered below. The very terms of the relevant statutes required such a judgment, depending as they do for liability against the United States on a wrongful or negligent act or omission, 28 U.S.C.A. 1346, 2671-2680, and application of the local law where the injury occurred.

CONCLUSION

The Trial Court properly entered judgment that Petitioners take nothing by their suit, and the Court of Appeals properly affirmed that Judgment; two Courts having so ruled, the Supreme Court should not be called upon to again review the issue of sufficiency of the evidence and accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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and

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CERTIFICATE OF SERVICE

I certify that three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were duly mailed to Mr. L. Taylor Zimmerman, Suite 808, Bassett Tower, 303 Texas Avenue, El Paso, Texas 79901, on this_____day of June, 1977.

HAROLD L. SIMS